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In the Supreme Court of the United States

OCTOBER TERM, 1981

ANN CLARK LAZZARA, PETITIONER

VERSUS

PLAINTIFFS' LEGAL COMMITTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner is the private contract attorney of plaintiffs who were parties to complex litigation resulting from a mass disaster. Her clients declined to contract with a Plaintiffs' Legal Committee (PLC) formed among the litigants, whereupon, on the court's motion, and over her opposition, she and her clients were ordered into the committee. Petitioner's employment contract with her clients is recognized as a property right by the positive law of the forum state. Title 37, Section 218, Louisiana Revised Statutes. Petitioner continued active representation of her clients throughout the proceedings, except where she had been pre-empted by the committee under the court order. At the close of the case she was ruled into court and had a personal judgment rendered against her (not the clients) for $92,400 as a contribution toward the PLC's fee. The court justified its order and judgment in the name of implicit judicial management power over its own docket and judicial economy.

The questions presented are:

1. Is not the petitioner here suffering the confiscation of her property in the public interest, without adequate and just compensation, in violation of the Fifth Amendment?

2. Can the petitioner be made to pay for the services rendered to her clients, who were themselves unwilling and forced employers?

3. Are not the petitioner's rights and benefits under her contract with her clients substantive rights rather than procedural rights? And are they not then controlled by the law of the forum in this diversity action?

4. Constitutional issues aside, what is the authority by which a Federal Court can visit upon a private contract attorney enforced idleness in the handling of her clients' affairs and then force her to divide her contract fees with other counsel, chosen by the court?

5. What are the standards and rules for forced employer fee-fixing in complex litigation?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NUMBER:

ANN CLARK LAZZARA

v.

PLAINTIFFS' LEGAL COMMITTEE*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Ann Clark Lazzara, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered May 28, 1982.

OPINIONS BELOW

The per curiam order and decree of the Court of Appeals (App. A) is not reported.

There was no formal opinion of the District Court. The transcript of the District Court's oral reasons in adopt-

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*The other parties to this proceeding are the individual attorneys who comprise the Plaintiffs' Legal Committee, who are John J. Cummings, III, A. Remy Fransen, Jr., Wendell H. Gauthier, Russ M. Herman, Stephen B. Murray, Leonard A. Washofsky and James A. Wysocki.

ing the Magistrate's Findings and Recommendations appear as Appendix B, and the Court's judgment is reproduced as Appendix C.

The Magistrate's Findings and Recommendations are attached as Appendix D.

JURISDICTION

The per curiam order and decree of the Fifth Circuit was entered on May 28, 1982. No petition for rehearing was filed. This petition for certiorari is being filed within the prescribed period of 90 days after May 28, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall...be deprived of life, liberty, or property, without due process of law...

2. Section 218 of Title 37 of the Louisiana Revised Statutes provides: (See Appendix I)

3. The Manual For Complex Litigation provides: (See Appendix I)

STATEMENT OF THE CASE

On December 22, 1977, a grain elevator owned by the Continental Grain Company exploded. As a result of this disaster, nearly 50 death and personal injury suits were filed in the district court. A Plaintiff's Legal Committee (PLC) was formed, selected by election by a number of the attorneys representing plaintiffs. Those elected were: John J. Cummings, III; A. Remy Fransen, Jr.; Wendell H. Gauthier; Russ M. Herman; Stephen B. Murray; and Leonard A. Washofsky. After the selection of the Committee, most other contract attorneys voluntarily entered into a contract with the Committee calling for the payment to the Committee of 8 per cent of recovery at the conclusion of the cases. Cases of individual Committee members were not subject to the 8 per cent fee. Later, a seventh attorney was added to represent the interests of the Federal Grain Inspection Service survivors.

By order of court entered May 3, 1978, the cases were consolidated and ordered to proceed as Complex Litigation. On the court's motion, a contradictory hearing was held on August 7, 1978, for all counsel to show cause why the PLC should not be appointed by the court under the Manual to represent all plaintiffs and to handle all pretrial activity and to be paid in accord with the agreement previously executed by the majority of plaintiffs and their attorneys. (Appendix E)

This motion was opposed by appellants and after

hearing resulted in recommendations and an order by the district court dated September 11, 1978. (Appendix F)

With the impending settlement of all claims arising out of the Continental Grain Disaster, the PLC moved the Court to award the committee compensation with respect to the claimants represented by Ann Clark Lazzara and Gibson Tucker, Jr. (being Geraldine Ledet Rapp who recovered individually and as tutrix of her children in the amount of $954,585.04; Geraldine Ledet Rapp as administratrix of the estate of Henry A. Rapp in the amount of $16,237.74; Mrs. Thompson P. Gros in the amount of $80,488.49); and against the claimants represented by Allen Berger (being Alvin James Thompson and Ann Feasor Thompson in the amount of $95,208.75).[1]

The PLC advanced as authority for its claim to the award of compensation the order of the Court entered on September 11, 1978. (Appendix G)

An extensive evidentiary hearing was held before Magistrate Carriere, resulting in recommendations which were subsequently adopted by Judge Lansing Mitchell, over objections filed by the appellants, after hearing, and resulting in a money judgment against appellant Lazzara in the amount of $92,400, as a forced fee contribution by her, out of her attorneys' fees, to the PLC. (Appendices B, C and D)

[1] The Berger dispute was settled prior to appeal.

Lazzara appealed. After oral argument on May 26, 1982, the Fifth Circuit Court of Appeals, two days later, in a per curiam opinion affirmed.

REASONS FOR GRANTING THE PETITION

I.

THE CASE INVOLVES A DECISION BY A FEDERAL COURT OF APPEALS OF AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED, BY THIS COURT.

The importance to the Federal Judicial System of the Complex Litigation approach to the handling of massive litigation growing out of a single disaster is, of course, not to be questioned. The burgeoning use of this device in federal litigation would of itself answer any arguments against the utility of this device and its many benefits. But Complex Litigation has become a two edged sword.

For all of the benefits it may bestow on the federal system, it has become a morass of uncertainty of unanswered critical questions to the private contract counsel for/and the individual litigants. We will address some of these problems and pit-falls in detail further on.

First, though, we wish to point out to the Court that this Court has not yet passed on any of the questions we

will present. No Complex Litigation case has been accepted by the Court in a posture which has allowed the Court to expound with the weight of its authority on the way the Manual is to be applied. And still the use of this device is growing by geometrical progressions.

The landmark case remains, as it has been since it was decided in April of 1977, *In Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Circ., 1977). That case is glaringly unsatisfactory as a guide to the bench and the bar. In the first place the case is not satisfactory as a final expression by *that Court* on the many issues which were discussed, because the decree affirmed part of the district court's decision, vacated part of the decision and remanded the case for further proceedings and then the case settled.

Further, as we will see in the discussion of the application of the *Everglades* opinion to the case at bar, there are ambiguities in *Everglades*, the resolution of which cannot be determined. More than that, the instant case presented out and out contradictions in the way it was handled, with the procedures which appeared to be prescribed by *Everglades*.

All of that, taken with the fact that the same circuit, when presented with the opportunity to clarify the import of *Everglades* in the field of Complex Litigation, more or less "punted" by affirming in a one-line per curiam, we say, presents a situation which crys out for this petition to be granted.

1. The Constitutional Issue

Everglades is silent on this point. Surely it presents a serious question. We see that once Lazzara had contracted with her clients with a written contingent fee contract, she had acquired a valuable property right—one which is recognized by explicit legislation of the forum state. See LSA R.S. 37:218 (Supra). She had the duty and the *right* to perform the services called for in the contract, and to be paid for them according to the contract. Somehow now she finds that $92,400 of her contract is being delivered to the PLC. She never agreed to that arrangement. Both she and her clients rejected any such arrangement when it was offered to her by the PLC when it was in its formative stages. She formally opposed the Court-sponsored motion to force her and her clients to accept the committee's representation.

More than that, the record establishes that she did not "coat-tail". In the Magistrate's recommendations (Appendix D), approved by the PLC and later by the District Court, at page 8, we find in item 18, this opening comment: "During the course of this litigation, respondents, Lazzara and Berger, did not sit idly by while the plaintiffs' committee prepared the case for trial" and the Magistrate goes on to describe some of their activities. Actually, Lazzara testified at length concerning her representation of her clients in every conceivable area left open to her by the court's judgment of September 11, 1978. No one disputes this. Masses of work product were introduced into evi-

dence. Prior to her partial exclusion from her representation of her clients by the court's order, she scheduled and actually took the *first* deposition taken in the entire case.

Everglades justified its holding, that there could be forced representation by the committee, and forced contribution by contract counsel to the committee's fee by commiserating with the system at the district level over its workload, and by extolling the virtues of Complex Litigation in relieving the problem, and the contribution of that device to the greater good of the public interest. But all of this simply aggravates the violation of Lazzara's due process rights. When valuable property rights are taken over by government authority in the interest of the common good, that is expropriation. Payment is demanded by the Fifth Amendment. And all the hearings in the world cannot excuse expropriation *without* payment. The court's decree of September 11, 1978 (Appendix F) coupled with its judgment against Lazzara for $92,400 is confiscatory and unconstitutional.

This aspect of the case brings out one of the unresolved ambiguities in *Everglades*. At page 1019 of the opinion we find the following:

> "One who hires and pays his own lawyer is not a free rider if the attorney is a contributor to the final results. The District Judge recognized this by excluding from the 8% contributions attorneys who continued to be active..."

What does this mean? How does it apply to the instant case?

2. Petitioner Is Being Forced To Pay Twice

Lazzara was a young and inexperienced attorney when her clients employed her. They employed her with full knowledge of these facts. With their approval, she associated her father at the very outset of her employment. Her father was an experienced trial lawyer, a long time Chancery Judge in Hattiesburg, Mississippi, returned to private practice. She paid him $25,000 for his participation, which was continuous, throughout the proceeding.

As the proceedings moved on, and early in the case and long before the appointment of the PLC, she associated an experienced local trial attorney, attorney of record here, whom she will surely have to pay. It is her agreement with her clients, as it should be, that *these* payments will come out of her contingent fee. And so she will have to pay twice. What else could she have done? How could she tell that she was going to be forced to pay a committee? Yet at the same time she knew that she had to augment her meager experience by associating experienced counsel. She should not be forced to pay twice.

II.

THERE IS A CONFLICT BETWEEN THE DECISIONS OF TWO COURTS OF APPEAL.

In *Everglades* and now in the case at bar, the Fifth

Circuit holds that these charges can be made personally against the private attorneys of the clients. The Motion to Award Compensation brought by the PLC (Appendix G) and the judgment of the district court (Appendix C) are levelled at Lazzara and condemn her to pay the PLC $92,400, plus interest.

In a case recently decided by the Court of Appeals, District of Columbia, as yet unreported, a similar decision of the District Court was considered and reversed. In *In Re: Air Crash Disaster Near Saigon*, No. 80-2428, the District Court had established a cost contribution formula. Two of the litigants refused to pay the contribution levied against them, and the District Court levied the costs personally against the attorneys representing the clients, and ruled that the attorneys would be in contempt of court if they did not pay them. But there were no charges of wrong doing or bad faith levelled at the attorneys. The Court of Appeal reversed, holding that the attorneys could not be held for the payment of the clients' costs. It is submitted that attorneys can no more be held to the payment of the clients' attorneys' fees, than they can for the payment of costs.

The three cases appear to be in hopeless conflict and the petition should be granted for this reason.

1. The Instant Case is in Conflict With The Holding in *Everglades*, Itself.

Everglades makes it abundantly clear that the Com-

mittee in that case was the forced representative of the non-contracting claimants *only* to the extent of developing and trying, if need be, *liability* issues.[1] The Court's order in the case at bar, forcing the Lazzara clients into the committee was carefully drawn to accomplish the same result (Appendix F). The Courts attention is directed to the fact that the order is drawn in two parts. The first part deals with the duties of the Committee as they pertain to the representation of their *contract* clients (who were each and every claimant with the exception of Lazzara's and Berger's clients).

It is only on the *last* page of the order that the Court addresses the duties (and authority) of the Committee to represent the *non*-contracting litigants (Lazzara's and Berger's clients). And the authority is patently limited to "discovery, preparation for trial, and trial of all liability issues" for the "plaintiffs, who have not contracted with the Plaintiffs' Legal Committee".

Now the Committee claimed 23,310 hours total. (Appendix D, p.9). Their time-logs demonstrate that literally thousands of these hours were devoted to settlement negotiations, which were beyond their authority as to Lazzara's clients, under the order under which the Committee operated.

It is true, to be sure, that the Lazzara claims were settled at the same time as the contract clients' claims

[1] Many of the claims in *Everglades* had not been settled as to quantum when the *Everglades* decree was entered.

were settled; but this *had to be*. It had to be for two reasons. First, it is the fact, and nobody disputes it, that the settlement offers made by the *Defense* Committee, were *always* on an all or none basis. In other words, *all* of the claims had to settle, or the offers were not valid. And, second, it is the fact that the Defense Committee flatly refused to negotiate the Lazzara claims other than thru the PLC. Such representation as there was of the Lazzara claims then, in the settlement hours of labor was *not* done under the aegis of the court order, and it *had* to be done in order for the PLC to represent all of its own clients.

Everglades does not justify the charges which Lazzara is being forced to pay, herself, for these hours which are beyond the authority of the Committee.

Everglades made it clear that *no* charge could be made for hours expended prior to the Court's order directing the plaintiffs' representation by the Committee. There were a total of 4,419 hours claimed by the Committee for work done *prior* to the Court's order of September 11, 1978 (Appendix F).

Everglades would have required that the fees which the Committee received from their own clients be taken into account in determining the amount of contribution to be exacted from the attorneys who refused to contract with the Committee. The Court said, p. 1017:

> "The principles underlying use of lead and liaison counsel are blurred in this case by the Committee members, having 60 cases of their own. Ap-

pellants ask, 'why pay them for doing what they would have done anyhow on behalf of their own clients?' This is too simplistic. It is uncertain that appellants or any other plaintiff lawyers would have been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage. *The Committee members' 60 cases may affect the amount paid them as lead counsel but not the power of the court to require payment.*" (Emphasis added).

In his approved findings the Magistrate found:

21. Applying the principles of *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974), and the facts found aforesaid, this Court finds that a fair and equitable hourly attorneys' fee is $100.00 per hour. See: Neely v. City of grenada, (5 Cir. No. 78-1762, August 20, 1980).

There follows a spread display of the monies actually received by each member of the Committee, taken from the records in evidence. It should be remembered that each of the Committee members had their own personal clients with whom they had direct contingent fee contracts, and that these fees went direct to the Committee member involved. These sums appear on the display as "DIRECT CONTRACT FEE". In addition, the individual members participated in the total fees paid to the Committee by all other attorneys than Lazzara and Berger, according to a formula they worked out among themselves, that resulted in the amounts listed under "PLC CONTRACT FEE". The

hours listed under the "HOURS" column is the amount of hours they *claimed* without any editing or discount for any reason.

We see that if the Magistrate had given any account to the payments which the members received from contracting clients, every member of the Committee was already paid in excess of the rate which the Magistrate felt would adequately compensate him, and some of them x 2, 3 and 5.

PLAINTIFFS' LEGAL COMMITTEE
COMPUTATION OF HOURLY RATE OF PLC

PLC ATTORNEY	DIRECT CONTRACT FEE	PLC CONTRACT FEE	FEE TOTAL
Cummings	436,926.96	365,901.68	802,828.64
Fransen	359,906.29	165,396.70	525,302.99
Gauthier	547,105.22	365,901.68	913,006.90
Herman	189,234.48	205,255.74	394,490.22
Murray	309,410.52	205,255.74	514,666.26
Washofsky	622,451.23	134,622.58	757,073.81
Wysocki	276,071.95	99,071.39	375,143.34
TOTALS	2,741,106.65	1,541,405.51	4,282,512.16

PLC ATTORNEY	HOURS	HOURLY RATE
Cummings	6,798.25	118.09
Fransen	1,610.40	326.19
Gauthier	4,317.34	211.47
Herman	3,707.75	106.40
Murray	3,420.06	150.48
Washofsky	1,434.50	527.76
Wysocki	2,024.75	185.28

III.

THE MAGISTRATE'S COMPUTATIONS WERE GRIEVOUSLY AND DEMONSTRATIVELY ERRONEOUS.

We quote from the Magistrate's Approved Recommendations (Appendix D).

> 22. Because of the method by which many of the members of the Plaintiffs' Committee kept their hours and because of the Wysocki reconstruction, this Court cannot with certainty determine the total hours that they expended in this litigation. The Committee claims 23,310 hours. This Court finds that between September 11, 1978, the date the Committee was appointed, to May 5, 1980, the date the order of dismissal was entered, the Plaintiffs' Committee expended 21,000 hours in the prosecution of this litigation.

The "Wysocki Reconstruction" refers to Wysocki's candid testimony that he did not keep contemporaneous time records as he was plainly required to do by the Court's order (Appendix H); and in violation of the detailed recommendations of the Manual for Complex Litigation, para. 1.47, p. 308-309. His total hours were 2,024.75. We have already said that hours claimed for work done prior to the Court order forming the Committee totalled 4,419.

It should also be noted that Washofsky produced *two* sets of time logs, and testified that he had simply inflated the hours he claimed in the second set by adding 300

hours of reconstructed time (which is impermissable) and by inflating the hours he claimed for the same identical activities by 400 hours in preparation for this litigation.

Herman similarly produced *two* sets of time logs, in the second set of which he inflated the time spent for the same activity for a total of 382 hours.

But the commissioner disallowed *only 2,310 hours.* According to his own rules this simply cannot be. He would have to have disallowed 7,525.75 hours.

IV.

THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT ON A FEDERAL QUESTION.

In order to address this reason for allowing the petition for certiorari, the Court will first have to determine whether Lazzara's claim to be paid and to keep the $92,400 of her contract fee, instead of being required to turn it over to the PLC, is a substantive right, as she contends that it is; or whether it is "a federal procedural issue and therefore not subject to the dictates of Louisiana Law" as the District Judge found it to be (Appendix B, p.66). Unquestionably she had the right to be paid the money under her contract and under positive legislation of the forum state. LSA R.S. 37:218. This could not be other than a substantive right. How can it become a procedural right when the

court takes it away from her and gives it to the PLC? No authority is given for the view that this is a procedural right. And the fact that the *Everglades* court, without discussion of the issue, applied the so-called "fund doctrine" is not determinative.

This brings us to Your Honor's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 44 L.Ed. 2d 141, 95 S.Ct. 1612 (S. Ct., 1975).

In *Alyeska*, the Court of Appeals had awarded attorneys fees to the plaintiffs under the equitable powers of the court on the theory that the plaintiffs, an environmentalist group seeking to enjoin construction of a pipeline, were performing the services of a "private attorney general." 421 U.S. 240, 241. The Court of Appeals reasoned that the plaintiffs had acted to vindicate "important statutory rights of all citizens" (under the Mineral Leasing Act, 30 U.S.C. 185) and that they were entitled to attorneys' fees "lest the great cost of litigation deter private parties from seeking the enforcement of the laws protecting the environment." *Alyeska*, p. 245.

The Supreme Court reversed. The Supreme Court analyzed in depth the entire history of fee assessment by federal courts. It concluded its analysis by observing that the general rule, known as the "American Rule" (p. 247) prevails to date and that "...absent *statute* or *enforcable contract*, litigants pay their own attorneys' fees." (p. 257). (Emphasis Supplied).

The court went on to examine certain exceptions to the "American Rule", among them, the "fund doctrine" originating with *Trustees v. Greenough*, 105 U.S. 527. The court cited *Central Railroad & Banking Co. v. Pettus*, 113. U.S. 116; *Sprague v. Ticonic National Bank*, 307 U.S. 161, and *Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Har.L.Rev. 1597.

So far as any general, equitable power on the part of the federal judiciary to fashion awards of attorneys' fees is concerned, the court spoke definitively. With the exceptions mentioned by the court (the "Fund Doctrine") the court repudiated any general, equitable power. Referring to any possible recognition of such a general, equitable power by Congress, the court said:

> "But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against non-statutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." (p. 263).

Significantly, all of these authorities cited in *Alyeska* are ones cited in *Everglades* as "reinforcing" the court's decision that it had the authority to award attorneys' fees as it did. (p. 1017). But *Alyeska* seems to say that they are the *only* authority under which the court could fashion such a decree. It could not do it under the authority of the *Manual*. And the only applicable exception to the "Ameri-

can Rule" recognized in *Alyeska* is the "Fund" doctrine.

At page 258, after referring to *Greenough*, etc., as the only acceptable judicially fashioned exceptions to the "American Rule" the *Alyeska* court said this:

> "These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here."
>
> "31. A very different situation is presented when a federal court sits in a diversity case. "In an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

What *Alyeska* holds, then, so far as the instant proceeding is concerned is that with the exceptions noted in that case, federal courts have no general, equitable powers to deviate from the "American Rule" in fee allocation. And further, that when federal jurisdiction in the cause rests on diversity of citizenship, even the judicially fashioned exception to the "American Rule" (i.e., the "Fund" doctrine espoused in *Greenough* and *Sprague*) is applied *only if it is agreeable to the state statutory law and judicially created rules.*

Prior to the decision in Alyeska, in *Aerosonic Corporation v. Trodyne Corporation*, 402 F.2d 223 (C.A. 5,

1968), the Fifth Circuit had the occasion to put into practice *Alyeska's* conclusions as to the equitable authority of the federal court espoused in *Sprague*, in a diversity case. Pointing out the Florida statute which prohibited assessment of plaintiff's fees against the defendant as an item of damages, absent express statutory authority or contractual provision the court ruled, p. 229:

> "Appellee suggests that the Supreme Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct., 777, 83 L.Ed., 1194 (1939), held that allowance by federal courts in equity suits of counsel fees and other expenses entailed by the litigation but not included in the ordinary taxable costs recognized by statute is part of the historic equity jurisdiction of federal courts. It is true that the Supreme Court so held, but it was not considering a diversity case. The litigation involved the liquidation of a national bank under the provisions of an Act of Congress. It is not to be doubted that where the jurisdiction of the federal court is based on the existence of a federal question, federal law applies as to both substance and procedure, *Atlantic Coast Line R. Co. v. Dixon*, 5 Cir., 1953, 207 F.2d. 899, but this is not the rule for diversity cases.
>
> "Since *Erie R. R. Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938) it is the law that where federal jurisdiction is based on diversity of citizenship and not on the federal Constitution or some Act of Congress, a federal court is in effect only another court of the state in which it sits and applies the same law that would be applied if the action had been brought in state courts. It follows that in diversity cases the federal courts cannot allow recovery

if the right to recover is denied by the State, and this is true regardless of the form of the action and whether the remedy is sought at law or in equity, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079, 160 A.L.R. 1231 (1945), rehearing denied 326 U.S. 806, 66 S.Ct. 7, 90 L.Ed. 491. The outcome of litigation in federal court with respect to a state created right should be the same as it would be in the state court, *Guaranty Trust Co. of New York v. York*, supra; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956). On this line of authority, since attorneys' fees in this case could not have been allowed as such by a state court the United States District Court had no authority to allow them."

How then did this same circuit rule in favor of the fee assessment in *Everglades*? There could be many answers to this question. In the first place no mention is made in the opinion that the case is a diversity case, though it might very likely have been one. This suggests strongly that no mention was made of this question by any of the litigants, and so was not even considered by the court.

A good reason for not mentioning it might have been that the Florida state courts follow the "Fund" doctrine, and would have themselves agreed to such a ruling.

The monies in question here were beyond doubt the property of the plaintiffs under the settlement of their case, and just as clearly were payable by the plaintiffs to respondent Lazzara under her fee contract with the plain-

tiffs. We now see that under the judgment of the court below the monies, plus an additional sum, must be paid to the PLC. These are substantive rights which are involved and they are decided by substantive not procedural law. Under *Alyeska* and *Aerosonic*, in this diversity case, these rights must be determined under the law of Louisiana.

It has not been questioned that Louisiana law has never allowed the imposition of an attorney's fee under the circumstances of this case. The respondents were solicited to agree with the PLC to be represented by them and refused. Their private attorneys proceeded to represent them until the PLC successfully prevailed on the Court to order the PLC into a position where they represented the clients, and invested them with the authority to do so. Thereafter in the representation of their own clients by the PLC, the respondent's claims were reluctantly settled. But there is no authority for the Court to take part of the fees of the contract attorneys and deliver them to the PLC, over the objection of the clients and their contract attorneys under any theory of Louisiana law.

The decision below conflicts with the decision of this court in *Alyeska*.

V.

THE CONFLICT OF INTEREST

This sub-heading of the reasons for granting the peti-

tion for certiorari is really an explicit example of subheading I, which is to say the need of the bench and bar for an expression from the Supreme Court of guidelines in what is fast becoming a real danger in the use of the Complex Litigation approach to the handling of mass disasters.

The dangers of conflicts of interest in such a case as this one are glaringly apparent, when we consider that the Committee members have their own contract clients in whose recovery they participate to the extent of from 33⅓% to 40%. While at the same time there are a majority of litigants in whose recovery they participate to the extent of only 8%.

To avoid the obvious criticism which would follow a lump sum offer in settlement of all cases, with an allocation of the lump sum to the different claims by the PLC, the Plaintiff *Settlement* Committee (three members of the PLC) and the Defense Settlement Committee (DFC) labored mightily in their negotiations to have it appear that the DFC was offering settlement figures, claim by claim.[1] The validity of this ploy loses much of its force, even so, when we consider the fact, and it was a fact, that the DFC *always insisted* that its offers were on an "all or none" basis. Either everybody settled or each and every offer was void. The question naturally arises, "What possible difference could it make to the DFC who got how much?"

[1] The Committees kept near verbatim minutes of their meetings, which were obtained by petitioner under discovery and which were revealing.

However that may be, the case of the claim for Patrick Rapp is illuminating. Patrick died immediately in the explosion. He had no surviving descendants or ascendants, but there were five siblings who survived the explosion, all represented by Committee member Murray.

It happened that he had a sixth sibling, Henry Rapp, who was also killed in the explosion. Under Louisiana Law, if Henry survived Patrick, by so much as an instant, then Henry's claim in Patrick's death would have been on an equal footing with the five other siblings, and would have descended to Henry's children. They were represented by Lazzara.

Now Murray was, in effect, Lazzara's (and her clients') representative on the PLC, because both of the decedents had been employees of an independent contractor working on the building.[1]

There was medical evidence that Henry died a lingering death by suffocation and thus survived his brother, Patrick.

There was a suit by Lazzara and her clients for damages due to Patrick's death.

The DFC consistently denied any substance to this

[1] The categories of the decedents ranged from employees, who were faced with a workmens' compensation defense, to business invitees against whom there could hardly be a defense, each category represented by a particular member of the Committee.

claim on the basis of the Louisiana Law of comorientes. Lazzara kept insisting that comorientes does not apply in wrongful death claims.[2]

The final offer for Patrick's death was $81,368.70. Murray accepted the offer. But somehow, not yet clear, this was all to be paid to *Murray's* clients. Lazzara's clients were to receive *none* of the settlement. Lazzara went direct to the Magistrate. Lazzara's clients received an *additional* share from the DFC dollar for dollar on the same basis as the other (Murray) siblings. Thus, the footnote on page 9 of Appendix D.

While it is true that the Magistrate excluded the $16,000 received in the Lazzara settlement from his fee allocation formula, it is also true that she paid for every one of Murray's 3,420 claimed hours, for this masterful attention to her clients' interests.

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[2] She was correct. *Collins v. Becnel*, 297 So.2d 506.

CONCLUSION

The petition for certiorari should be granted and the judgment against the petitioner should be vacated and the motion and rule should be dismissed.

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